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No. 91-314

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHAMP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's factual finding that a work stoppage which began as an economic strike was converted to an unfair labor practice strike by petitioner's unlawful discharge of certain strikers.

2. Whether the court of appeals properly enforced the Board's back-pay order.

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OPINIONS BELOW

The amended opinion of the court of appeals, 1 Pet. App. 1-53,[1] is reported at 933 F.2d 688; the prior opinion of the court of appeals, 1 Pet. App. 54-102, is reported at 913 F.2d 639. The decision and order of the National Labor Relations Board, 1 Pet. App. 103-164, including the recommended decision of the administrative law judge, 2 Pet. App. 1-639, is reported at 291 N.L.R.B. 803.

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[1] The appendix to the petition comprises two volumes, each paginated separately. References to the first volume will be designated "1 Pet. App." and the second volume "2 Pet. App."

JURISDICTION

The original opinion of the court of appeals, 1 Pet. App. 54, was filed on August 29, 1990. A petition for rehearing was denied on May 20, 1991, 1 Pet. App. 5-6, and an amended opinion was filed on that date. 1 Pet. App. 1. The petition for a writ of certiorari was filed on August 17, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a strike marked by acrimony and confrontation. 1 Pet. App. 127-132; 2 Pet. App. 50-63, 69-104, 111-137, 175-249. The Board concluded that petitioner Champ Corporation engaged in a variety of unfair labor practices in response to the strike conducted by members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America-UAW, Local 509 ("the Union").[2] Petitioner challenges only one

[2] In agreement with the ALJ, the Board found that, during the strike, petitioner violated Section 8(a)(1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), by threatening to have striking employees fired or arrested while they were peacefully picketing, by offering increased benefits to strikers if they abandoned the strike and returned to work, and by threatening employees on the picket line with vehicular assault. 1 Pet. App. 134-135; 2 Pet. App. 604-605. The Board further found that, after the strike ended, petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging or refusing to reinstate certain strikers because of their union activities, by refusing to make timely offers of reinstatement to 50 strikers, by limiting the duration of the reinstatement rights of four employees, by placing impermissible preconditions for reinstatement on certain striking employees, and by failing to give two employees a reasonable amount of time to respond to offers of recall. 1

factual finding here: that its unlawful discharge of certain strikers converted the work stoppage from an economic strike to an unfair labor practice strike.

The dispute began on October 15, 1979, when the unit employeees of the Union voted to strike because of dissatisfaction with the progress of negotiations with petitioner Champ Corporation. 2 Pet. App. 46. On the second day of the strike, October 17, General Manager Tom Simovich approached two picketing employees, Baugh and Naranjo. He told them that they were "fired" and that they did not work for petitioner any more. Simovich also directed them to "go home" and threatened to have them arrested if they did not comply with his directive to leave the premises. 1 Pet. App. 111; 2 Pet. App. 107-110.

On October 25, petitioner's labor negotiator, Edmund Hoy, presented union representative Ralph Gazzigli with a list of strikers who "would never be rehired or reinstated under any conditions"; the list contained five names, including Baugh's. 1 Pet. App. 112; 2 Pet. App. 144-146, 157. Gazzigli told Hoy that, as the Union's representative, there was no way he could agree to negotiate away any individual's job. 2 Pet. App. 146-147.

Pet. App. 136-140. Finally, the Board found that petitioner violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by unilaterally granting to its nonstriking employees additional paid holidays without notifying or consulting with the Union, by withdrawing recognition from the Union and thereafter refusing to bargain with the Union until a decertification petition had been processed, and by refusing or unduly delaying the furnishing of information relevant to the Union's performance of its duties. 1 Pet. App. 135-136.

The court of appeals affirmed these findings, many of which were not contested by petitioner, and enforced the Board's order. 1 Pet. App. 53.

At the next negotiating session, on October 31, Hoy announced that he wanted to present a list of employees that petitioner would not take back, even if the parties reached an agreement or the strike ended. Gazzigli cautioned Hoy that putting the list on the table would change the entire mood of negotiations and that, in any event, the Union would not and could not negotiate away any individual's rights or job. Gazzigli suggested that Hoy keep the list and that, if petitioner had any problems with the individuals listed, it should contact the proper authorities and let them take any necessary action. Hoy did not formally present the list to the committee, but he did place it on the table. Steve Baugh, a member of the bargaining committee, recognized several names on the list, including his own. 1 Pet. App. 113; 2 Pet. App. 157-163.

On November 5, the Union conducted a membership meeting. Ralph Gazzigli, the bargaining committee members, and about 55 strikers attended. At the meeting, Baugh related what General Manager Simovich had said to him and Naranjo on October 17—that they might as well go home because they were fired and would never again work for petitioner. Baugh also told the assembled employees about the list he had seen at the October 31 negotiating session, and Gazzigli informed them that he had told petitioner that the Union would not negotiate away any striker's right to reinstatement. The strikers then voted unanimously to support the Union's position that they would not go back to work unless petitioner agreed to rehire all of them. 1 Pet. App. 115 n.10; 2 Pet. App. 163-166.

Early in April 1980, the striking employees discussed whether to terminate the strike. It was agreed

that, because the strike seemed ineffective and the Union had filed numerous unfair labor practice charges against petitioner, the better strategy would be to make an unconditional offer to return to work and to pursue the charges with the Board. 2 Pet. App. 284-285. On April 17, the Union sent petitioner a telegram notifying it that the striking employees unconditionally offered to return to work on April 21. 2 Pet. App. 285. On April 21, over 50 of these employees appeared for work. *Id.* at 287-288. Petitioner, however, did not put any of the strikers to work. Rather, it delayed reinstating any of the strikers until May 9, 1980, and thereafter staggered their recall. *Id.* at 286-287, 291-298, 322-325, 396, 541, 544-545, 550.

2. The Board, in agreement with the ALJ, found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging Baugh and Naranjo on October 17. 1 Pet. App. 111. The Board noted that General Manager "Simovich's remarks were entirely unequivocal [and] were phrased as an immediate discharge." *Ibid.* The Board further agreed with the ALJ that petitioner "effectively terminated the employment" of four other employees when it presented their names to the Union (as well as Baugh's) and asserted that "they would 'never' resume their employment 'under any conditions.' " *Id.* at 113-114. Finally, the Board agreed with the ALJ that these discharges "served to convert the strike to an unfair labor practice strike" on November 5, 1979. *Id.* at 115 n.10. As the ALJ stated:

> On November 5, during a union meeting, the matter was discussed and the membership voted that no striking employees would return to work

> until all employees, including those listed by [petitioner], were reinstated by the Company. Thus, the record clearly establishes a causal nexus between [petitioner's] unfair labor practice and the decision to not end the strike and return to work until all striking employees were reinstated.

2 Pet. App. 489. Because the Board found the strike had become an unfair labor practice strike, it ordered petitioner, *inter alia*, to offer reinstatement to those strikers not yet reinstated and to make the strikers whole. 1 Pet. App. 143-144, 149-150.[3]

3. The court of appeals, concluding that the Board's decision was supported by substantial evidence, enforced the order. 1 Pet. App. 53. In upholding the Board's finding that the October unlawful discharges had converted the work stoppage from an economic strike to an unfair labor practice strike, the court made clear that it agreed with the standard adopted by the other circuits: that only "violations of the National Labor Relations Act which aggravate or prolong an economic strike will convert it to an unfair

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[3] If the Board had not found that the unfair labor practice converted the work stoppage from an economic strike into an unfair labor practice strike, it would not have ordered this relief. Unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work. *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956). Economic strikers, on the other hand, are entitled to reinstatement only if they have not been permanently replaced or as vacancies occur; an employer is not required to discharge permanent replacements hired during the strike to make room for economic strikers. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938).

labor practice strike." 1 Pet. App. 23-24.[4] Applying that standard, the court concluded that the Board's General Counsel had proved that the strike was prolonged or aggravated by the discharges. 1 Pet. App. 23. The court stated that "Champ's notification to the Union's principal negotiator that certain striking employees, including a member of the employees' negotiating committee, would never be rehired or reinstated 'under any conditions' expanded the existing economic dispute between the parties to include the employment status of striking employees and delayed settlement of the strike." 1 Pet. App. 25. The court added that, in view of "this direct challenge to union solidarity and collective action," a resulting "vote of the membership * * * to remain on strike until all strikers were reinstated [w]ould have been foreseeable to any rational employer." *Ibid.*

The court rejected petitioner's contention that no conversion finding could be made because the discharges had not become an issue in bargaining negotiations during the strike. 1 Pet. App. 28. The court found that petitioner had "gratuitously presented the issue of the company's refusal to rehire the dis-

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[4] In its initial decision, the court stated that an economic strike " 'becomes an unfair labor practice strike when the strike is expanded to include a protest over unfair labor practices.' " 1 Pet. App. 72, citing *NLRB* v. *Top Mfg. Co.*, 594 F.2d 223 (9th Cir. 1979). The court added that, "[t]o the extent" its test differed from that of another circuit, it would adhere to circuit law. 1 Pet. App. 73-74. Petitioner requested rehearing, contending that the court had established a new and erroneous standard concerning strike conversion which conflicted with that of other circuits. The court denied the petition for rehearing but amended its opinion to clarify that it had applied the uniformly accepted "aggravate or prolong" standard. 1 Pet. App. 3, 23-24.

charged employees" during the negotiations, that its "impact in the pending negotiations should have been obvious," and that, in any event, "the record shows that the Union's negotiator informed [petitioner's] representative that the Union could not agree to deny reinstatement to any person." *Id.* at 29-30.

ARGUMENT

The petition presents two issues. The first is a fact-bound question of substantial evidence on which the court of appeals' decision is unassailably correct. And the second is, by statute, unreviewable because petitioner failed to raise it before the NLRB. Neither issue involves a split in circuit authority; nor do they present questions of overriding national importance. Accordingly, review by this Court is unwarranted.

1. Petitioner no longer disputes that it unlawfully discharged five striking employees. It challenges only the Board's finding, upheld by the court of appeals, that those discharges converted the economic work stoppage into an unfair labor practice strike. Petitioner acknowledges, as it must, that the court of appeals confirmed the well-settled standard for determining this issue—whether the subsequent unfair labor practices expanded or prolonged the course of the strike. Pet. 17; 1 Pet. App. 23 ("We agree with Champ that the burden is on the General Counsel to *prove that the unfair labor practices aggravated or prolonged the strike.*" (emphasis added)); *id.* at 24 ("[W]e agree with those circuits that have adopted the principle that violations of the National Labor Relations Act *which aggravate or prolong* an economic strike will convert it to an unfair labor prac-

tice strike." (emphasis added)).[5] Petitioner simply objects to the Board's and the court of appeals' application of that settled standard; it argues that substantial evidence does not support the Board's finding of prolongation here. Pet. 16, 18. Such a fact-bound issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the record amply supports the Board's finding that petitioner's unfair labor practices prolonged the strike.

In deciding whether an unfair labor practice has converted an economic strike into an unfair labor practice strike, the Board considers both objective criteria concerning the likely effect of the practice and subjective evidence of its actual effect. As the court explained in *Soule Glass & Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1981):

> Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable strikers in the relevant context. Applying subjective criteria, the Board and court may give substantial weight to the strikers' own characterization of their motive for continuing to strike after the unfair labor practice.

Accord *C-Line Express*, 292 N.L.R.B. 638 (1989).

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[5] See, *e.g.*, *Soule Glass & Glazing Co.* v. *NLRB*, 652, F.2d 1055 (1st Cir. 1981), citing *NLRB* v. *Top Mfg. Co.*, 594 F.2d 223 (9th Cir. 1979); *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978); *NLRB* v. *Jarm Enterprises, Inc.*, 785 F.2d 195, 204 (7th Cir. 1986); *Facet Enterprises, Inc.* v. *NLRB*, 907 F.2d 963, 977-978 (10th Cir. 1990); *Rogers Mfg. Co.* v. *NLRB*, 486 F.2d 644, 649 (6th Cir. 1973); cert. denied, 416 U.S. 937 (1974).

Here, both objective and subjective factors support the Board's conversion finding. Petitioner not only told various union members that they were fired, but gratuitously injected that issue into the bargaining negotiations by taking the position that certain strikers would not be reinstated under any circumstances —a position from which petitioner never retreated. As an objective matter, petitioner should have known that its stance would prolong the strike; it is axiomatic that reinstatement for strikers is often a critical element in the settlement of a strike. *See Air Line Pilots Ass'n Int'l* v. *O'Neill*, 111 S. Ct. 1127 (1991); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 499-508 (1983); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232-237 (1963). And it takes little foresight to predict that such actions could antagonize strikers and prolong the strike, as singling out certain workers is a threat to union solidarity and collective action. 1 Pet. App. 25. Indeed, the Union's negotiator told petitioner that its position on reinstatement would aggravate matters. 2 Pet. App. 160.

The subjective evidence of strike prolongation is even stronger. At a union meeting, various members complained that they had been fired; others reported that petitioner had tendered a list of individuals who would, under no circumstances, be rehired. 2 Pet. App. 163-164. The members unanimously voted not to return to work unless petitioner agreed not to single anyone out. *Id.* at 164-165. This action by the employees—unanimously voting not to return unless all strikers were offered reinstatement—clearly demonstrated that the unfair labor practice of firing striking workers had become an issue in the strike.

Petitioner also contends that the discharges could not have prolonged the strike as the economic issues that separated the parties at the strike's inception were unresolved at its conclusion. Pet. 18. While commission of an unfair labor practice during a strike

does not automatically convert the strike into an unfair labor practice strike, " '[t]he employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor.' " *NLRB* v. *Jarm Entersal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 *prises, Inc.*, 785 F.2d 195, 204 (7th Cir. 1986), quoting *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978); accord *Soule Glass*, 652 F.2d at 1080. The fact that economic issues were unresolved does not negate the inference that the employees would have ended the strike sooner or that the negotiating atmosphere would have been better had petitioner not aggravated matters by firing and flatly refusing to reinstate certain strikers.[6]

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[6] None of the cases cited by petitioner support its contention that the Ninth Circuit has applied the conversion test differently than other circuits. In *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978), Pet. 16, on facts similar to those here, the court upheld the Board's finding that the discharge of strikers during an economic strike converted it into an unfair labor practice strike. 574 F.2d at 840; see also *Rogers Mfg. Co.* v. *NLRB*, 486 F.2d 644, 649 (6th Cir. 1973) (insistence on superseniority for strike replacements prolonged strike). Petitioner's reliance on *Soule Glass*, 652 F.2d at 1080, Pet. 15-17, is similarly misplaced. The court there did reject the Board's finding of conversion, but the facts were very different from those here. The employer in *Soule Glass* granted a wage increase to nonstrikers; the court agreed that the wage increase set a floor under which the union would not settle its outstanding economic demands but found that it had no effect on the length of the strike because the union was already adamantly demanding a wage increase greatly in excess of that granted the nonstrikers. *Id.* at 1080-1082, 1105-1106. Here, in contrast, the employer's refusal to reinstate workers actually triggered the Union's demand that all workers be reinstated.

Furthermore, in *Jarm Enterprises*, 785 F.2d at 204, Pet. 19, the court *upheld* the Board's finding that the employer's re-

2. The second issue raised by the petition is whether the six-and-one-half-year delay between issuance of the administrative law judge's recommended decision and the issuance of the Board's decision and order made enforcement of the order unreasonable.[7] Specifically, petitioner contends that the court of appeals "abdicat[ed] * * * its responsibility to ensure the reasonableness and fairness of the Board's decisions," Pet. 14, by enforcing the Board's order despite the delay. But there is a reason why the court of appeals never reached the issue of delay: Petitioner never raised it.[8] Because petitioner failed to pre-

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fusal to provide financial data impeded bargaining negotiations, and in *NLRB* v. *Burkart Foam, Inc.*, 848 F.2d 825, 832 n.6 (7th Cir. 1988), Pet. 15, the court agreed with the Board that an employer's unlawful refusal to execute an agreement prolonged the strike. In neither case did the court demand a showing of how the negotiations were actually delayed. Indeed, the facts here are much stronger than they were in *Jarm*: the court there noted that "[t]his is not the classic example of strike conversion where the unfair labor practice becomes an issue that further motivates the strikers." 785 F.2d at 204. But this case is. There is direct evidence that strikers were affected by the unfair labor practice and that they actually voted to remain on strike until that practice was rescinded. See pp. 5-6, *supra*.

[7] The ALJ's decision issued on February 4, 1982; the Board's decision issued on November 25, 1988. The Board has recently taken steps to eliminate excessive delay in its proceedings. See Statement of James M. Stephens, Chairman of the National Labor Relations Board, *Hearings Before Subcomm. of the House Comm. on Appropriations*, 102d Cong., 1st Sess. Pt. 7, at 593 (1991).

[8] Petitioner asserts that it "expressed concern" that, because of administrative delay, the consequences of enforcing the Board's order would "likely prove economically fatal." Pet. 11. But review of the briefs filed in the court of appeals—now lodged with the Court—reveals that petitioner's expression of concern did not rise to the level of advancing a legal

sent the issue to the court of appeals, review by this Court is inappropriate. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Heckler* v. *Campbell*, 461 U.S. 458, 468 n.12 (1983).

Review of this issue is not only inappropriate; it is prohibited by statute. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner never urged this argument on the Board; nor has it attempted to demonstrate "extraordinary circumstances" which would excuse that failure. If petitioner believed that delay made the Board's remedial order unfair, it should have raised that argument before the Board in a petition for reconsideration. Its unexcused failure to do so forecloses consideration of the issue here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (Petitioner "could have

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argument. Nowhere did petitioner argue that, even if the Board's unfair labor practice findings were upheld, enforcement of its remedial order would be inappropriate because of delay. Rather, it concluded its argument concerning whether the strike became an unfair labor practice strike by stating that, in light of the extreme consequences of enforcement "(greatly exacerbated by the Board's inexcusable neglect in processing the parties' exceptions), *the Board's failure to establish a nexus between the alleged unfair labor practices and a prolongation of the strike requires a denial of the enforcement of the Board's order.*" Pet. Opening Br. 13 (emphasis added); see also Pet. Reply Br. 8. It goes without saying that asking the court to deny enforcement because the Board failed "to establish a nexus" between the unfair labor practice and prolongation of the strike is not the same as asking the court to deny enforcement because of administrative delay. As the briefs make clear, petitioner asked for only the former in the court of appeals; here, it urges the latter as well.

objected to the Board's decision in a petition for reconsideration or rehearing. The failure to do so prevents consideration of the question by the courts."); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

In any event, petitioner's claim is meritless. Petitioner does not contend that the Board's order is not necessary to make the strikers whole. Rather, petitioner contends that, because of administrative delay, making the employees whole would be unduly burdensome. Pet. 12. But such a contention is legally insufficient: This Court has made clear that "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); accord *NLRB* v. *Int'l Ass'n of Bridge Workers, Local 480*, 466 U.S. 720, 725 (1984).[9] It is also factually unsupported, as petitioner cites nothing in the record to support its claim of "extreme consequences."

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[9] The court of appeals cases relied upon by petitioner, Pet. 12-13, are inapposite. In those cases, unlike here, the courts found that, due to administrative delay, the Board's order was no longer appropriate to restore the status quo ante. See *NLRB* v. *Mountain Country Food Store, Inc.*, 931 F.2d 21, 22 (8th Cir. 1991) (cease and desist order not warranted where controversy that led to union handbilling on employer's property had become moot); *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 404-406 (5th Cir. 1991) (bargaining order not appropriate where employee complement had experienced large turnover); *Emhart Indus.* v. *NLRB*, 907 F.2d 372, 378-380 (2d Cir. 1990) (order barring unilateral changes in reinstatement policy inappropriate where all employees had been reinstated and plant had closed). And, in *NLRB* v. *Brookshire Grocery Co.*, 919 F.2d 359, 365 (5th Cir. 1990), the discussion of delay was dictum; the reinstatement order was found inappropriate because of the employee's misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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